

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN R. KELLY,

Petitioner,

-v.-

9:04-CV-218
(LEK)(DRH)

WILLIAM LAPE, Superintendent, Marcy
Correctional Facility,

Respondent.

APPEARANCES:

JOHN R. KELLY
Petitioner, *pro se*

HON. ELIOT SPITZER
Office of the Attorney General

OF COUNSEL:

PATRICK F. MACRAE, ESQ.

DAVID R. HOMER, U.S. MAGISTRATE JUDGE

ORDER

Presently before the Court is a second Motion to Expand the Record filed by John Kelly ("Petitioner" or "Kelly"). Docket No. 32. Respondent has opposed this Motion. Docket No. 34. The Court notes that Petitioner brought the same Motion early in this case. Docket No. 24. The previous Motion was denied as premature, as no record had been filed in the case. Docket No. 28. The state court record was filed with the Court on May 25, 2005.

Rule 7 of the Rules Governing Section 2254 Cases allows the record to be expanded by the parties by order of the Court. Rule 7(a) provides that:

If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

In a case where "... a thin written record contains substantial ambiguity about the events that bear potential legal significance, an expansion of the record is an efficient means

of assessing the merits of a petition ‘without the time and expense required for an evidentiary hearing’ or prior to such hearing.” *Valverde v. Stinson*, 224 F.3d 129, 135 (2d Cir. 2000).

Petitioner appears to seek expansion of the record to include trial transcripts, a decision from the Appellate Division, and the State’s brief filed with the Appellate Division. Petitioner also appears to be attempting to use this Motion to set out additional arguments relating to his claims. However, as Respondent points out, all of the documents that Petitioner seeks to have added to the record are already a part of the record. Moreover, any attempt to infuse new arguments into the Petition by way of a Motion to Expand the Record is clearly improper. Accordingly, Petitioner’s Motion to Expand the Record must be denied.

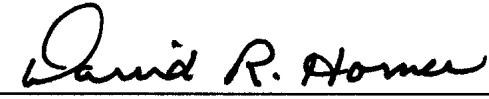
WHEREFORE, it is hereby

ORDERED, that Petitioner’s Motion to Expand the Record (Docket No. 32) is denied, and its is further

ORDERED, that Clerk serve a copy of this Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: November 14, 2005



United States Magistrate Judge